

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 05.02.2021

CORAM:

THE HON'BLE MR.JUSTICE M.DURAI SWAMY
AND
THE HON'BLE MRS.JUSTICE T.V.THAMILSELVI

T.C.A.NO.1156 OF 2010

M/s.Cherrytec Interlisolve Ltd.,
(formerly M/s.Cherrytec Solutions Ltd)
4, MAC House, Sardar Patel Road,
Guindy, Chennai - 600 032.

... Appellant

(cause title accepted vide order dated 13.07.2010
made in M.P.No.1 of 2010 in T.C.A(SR).No.22683 of 2009)

Vs.

The Assistant Commissioner of Income Tax,
Company Circle I,
Chennai - 34.

... Respondent

Prayer:-

Appeal preferred under Section 260A of the Income Tax Act,
1961, against the order of the Income Tax Appellate Tribunal,
Madras, Bench "A" Chennai, dated 26.09.2008 in
I.T.A.No.815/Mds/2007.

Against the order of the Commissioner of Income Tax
(Appeals)III, 121, Mahatma Gandhi Road, Chennai-600 034, dated
09.02.2007 in ITA.No.721/2005-06/A-III against the order of
Income Tax Appellant Tribunal Bench 'A' Chennai, dated
28.02.2006 PAN.No.AAACC9028P for Assessment Year 2003-2004.

For Appellant : Mr.R.Venkatanarayanan
for M/s.Subbaraya Aiyar

For Respondent : Mr.T.Ravikumar,
Senior Standing Counsel

JUDGMENT

(Judgment was delivered by M.DURAI SWAMY, J.)

Challenging the order passed by the Income Tax Appellate
Tribunal, "A" Bench in I.T.A.No.815/Mds/2007 for the assessment
year 2003-04, the assessee has filed the above appeal.

2.It is the case of the appellant that they are engaged in the business of Software Development and Consultancy. For the assessment year 2003-04 under appeal, the appellant filed its return of income on 27.11.2003 admitting an income of Rs.18,53,271/-. The case was selected for scrutiny and notice under Section 143 (2) was issued on 23.11.2004. Scrutiny assessment under Section 143(3) was completed on 28.02.2006 determining the total income at Rs.36,73,824/-. While completing the assessment, the Assessing Officer, among others, restricted the claim of deduction under Section 10A by excluding the expenditure incurred in foreign currency and telecommunication charges from the export turnover. The expenditure incurred in foreign exchange for rendering technical services to the extent of Rs.3,38,07,380/- has been excluded from the export turnover. According to the appellant, this entire expenditure represents salary and allowances paid to the employees who have been deputed abroad by the appellant as well as salary paid to the employees of the appellant in their STPI Unit in India and other administrative expenses incurred abroad and India. The appellant had deducted tax at source under Section 192 wherever applicable. The total expenditure represents salary and allowances of Rs.2,64,90,239/- and other administrative expenses of Rs.67,13,008/- representing office maintenance expenses, local conveyance, communication etc., of the Branch at Kuwait and Rs.6,04,133/- as sales commission paid to non-residents for procurement of orders, thus, the entire expenditure of Rs.3,38,07,380/- does not represent expenditure provided for technical services outside India. According to the appellant, the same cannot be excluded from the export turnover. The Assessing Officer held that the freight, telecommunication charges or insurance which are attributable to delivery of goods out of India are to be considered while reducing from consideration received in convertible foreign exchange. If such expenses are not attributable to delivery of goods outside India, such expenses are not required to be deducted from the consideration. Aggrieved over the order of the Assessing Officer, the appellant preferred an appeal before the CIT (Appeals) and the Appellate Authority by order dated 09.02.2007 confirmed the order and dismissed the appeal, as against which, the appellant preferred an appeal before the Income Tax Appellate Tribunal and the Tribunal, following the decision in the case of M/s.SIP Technologies Limited in I.T.A.No.2401/Mds/2005 dated 26.09.2008 held that expenditure should be excluded both from the export turnover and total turnover. Further according to the appellant, part of the expenditure cannot be excluded from the export turnover. Aggrieved over the order passed by the Income Tax Appellate Tribunal, the assessee has filed the above appeal.

3.The above appeal was admitted on the following substantial questions of law:

"1)Whether on the facts and circumstances of the case, the Tribunal was right in holding that the expenses incurred in foreign exchange should be excluded from the export turnover for the purpose of computing deduction u/s 10A of the Act?

2)Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the export turnover consisting exclusively of consideration received in foreign exchange should be reduced by expenditure incurred on telecommunication? And

3)Whether on the facts and in the circumstances of the case, the Appellate Tribunal failed to appreciate that telecommunication charges are part of expenditure incurred in respect of development of software/data and hence did not form part of export turnover?"

4.Heard Mr.R.Venkatanarayanan, learned counsel for the appellant and Mr.T.Ravikumar, learned senior standing counsel for the respondent.

5.The learned counsel appearing for the appellant submitted that the issue involved in the present appeal is covered by the decision of this Court made in T.C.A.Nos.961 & 962 of 2008 [M/s.Polaris Consulting & Services Ltd., (formerly known as M/s.Polaris Software Lab Limited), No.34, IT Highway, Navalur, Chennai - 603 103 Vs. The Deputy Commissioner of Income Tax] dated 23.10.2018 wherein the Hon'ble Division Bench of this Court held as follow:

"...

10.To be noted that the assessee, while contesting the appeal before the CITA as well as before the Tribunal, placed the entire materials as regards the development of the computer software. The assessee contended that they are engaged in the development of computer software programme, which is distinct from rendering of pure technical services, which would comprise of advice/consulting in relation to computer programmes. They are registered with STPI and as per the Registration Certificate, the assessee's activity

is developing computer software and they are not considered as an exclusive technical service provider, as understood in the software industry parlance. The assessee proceeded to explain its activities, as per the agreement with its clients, for developing software, which consisted of eight steps, they are as follows:

"1.Scope-Ascertaining the requirement of the customer and undertaking an indepth study on the proposal.

2.Requirements definition - Specification of the basic concepts and operation design, in relation to the final deliverable.

3.Designing-Designing of the deliverable, from a macro (overall flow of the integrated software) and micro perspective (designing of each module of the programme).

4.Application development - Developing the application (i.e. The modules and the related computer programmes and codes) as per the requirements of the customer.

5.Testing - Developer Integration Testing, System Integration testing and User Acceptance Testing; to ensure that the software developed works as required.

6.Defect fixing - Rectifying errors that have arisen during the testing process.

7.Production parallel run-Undertaking a dry run of the developed software system.

8.Customer user acceptance - Final acceptance of the Software developed."

11.The assessee's contention was that activity No.7 (supra) is usually undertaken onsite at the client's location. Activity Nos.4 to 6 and 8 can happen offshore and/or onsite. The need to send the personnel of the assessee to clients' location arises based on the nature of project, its size and complexity and the requirements of the client. Further they reiterated that all the activities are integral part of software development process and what is finally delivered to the client is computer software, which is essentially a

computer programme and the deliverable does not comprise of any advice on the computer software/programme. The assessee produced copy of the Registration Certificate given by the STPI, sample contract for development of computer programme, sample Statement of Work (SOW) in relation to the sample contract, copies of filing with the STPI and some sample invoices and related SOTEX filings. Thus, by placing heavy reliance on these materials, the assessee contended that it can be inferred that their business does not include rendering of any technical services on 'standalone basis'. Further, any service rendered, such as installation/training etc., is purely incidental to the activity of development of the computer programme, akin to a seller of an advanced machinery installing the same and training the user. The assessee placed reliance on the decision of the Hon'ble Supreme Court in the case of TATA Consultancy Services vs. State of Andhra Pradesh [(2004) 271 ITR 401]. By placing reliance on the said decision, the assessee contended that both branded software and unbranded/ customised software have been held to be 'goods' by the Hon'ble Supreme Court and the computer software would be in the nature of 'goods' and hence it will be erroneous to consider them as a provider of 'technical services'. Further, by referring to the customer contract and related statements of work and invoices, the assessee contended that it is engaged only in the activity of developing computer software and is not a technical services provider. The assessee also contended that there is a distinction in law between development of computer programme and rendering of technical services and in this regard referred to Section 10AA of the Act, defining 'export turnover'."

6.The learned counsel for the appellant as well as the learned senior standing counsel for the respondent submitted that in view of the judgment of the Hon'ble Division Bench of this Court, cited supra, the matter may be remitted back to the Assessing Officer for fresh consideration.

7.In view of the submissions made by the learned counsel on either side, while leaving the substantial questions of law open, we are remitting the matter back to the Assessing Officer for fresh consideration. The Assessing Officer shall decide the matter, on merits and in accordance with law, after taking into consideration the judgment made by the Hon'ble Division Bench of this Court date 23.10.2018 in T.C.A.Nos.961 & 962 of 2008. The

assessee is at liberty to produce all the relevant records to establish their case before the Assessing Officer.

8. With these observations, the Tax Case Appeal is disposed of. No costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

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To

1. The Income Tax Appellate Tribunal,
Madras, Bench "A"
2. The Assistant Commissioner of Income Tax,
Company Circle I, Chennai - 34.
3. The Commissioner of Income Tax Appeals III,
121, Mahatma Gandhi Road,
Chennai-600 034.

+1cc to M/s.Subbaraya Aiyar, Advocate, S.R.No.6818

+1cc to Mr.T.Ravikumar, Advocate, S.R.No.6362

T.C.A.No.1156 of 2010

KV(CO)
CS/10/03/2021

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